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No. 84-865 (2)

In The

Supreme Court of the United States

October Term, 1984

DALE J. GERO,

Plaintiff-Petitioner,

vs.

ANTHONY J. PIRES and CITY OF PITTSFIELD,

Defendants-Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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COUNTERSTATEMENT OF QUESTIONS PRESENTED FOR REVIEW

1. Whether an arrest warrant which contains the name of the intended arrestee and an alias but no physical description is constitutionally defective and creates in a mistaken arrestee a right to damages under 42 U.S.C. §1983 even if there were probable cause, apart from the warrant, to arrest the mistaken arrestee?

2. Whether the decision below or the record raises the Question Presented in the Petition "Should Baker v. McCollan, which holds that there is no constitutional violation where an innocent person mistakenly named in a warrant is arrested, be extended to a situation where an innocent person not named in the warrant is arrested?"?

3. Whether a different Fourth Amendment standard applies in money damage claims under 42 U.S.C. §1983 than applies in the criminal context?

4. Whether, on the evidence in this case, there was, as a matter of law probable cause to arrest the intended arrestee and a reasonably mistaken belief on the part of the arresting officers that the mistaken arrestee was the intended arrestee?

5. Whether, on the evidence in this case, supervisory personnel or the municipal employer could be liable for money damages under 42 U.S.C. §1983 on the basis of the arresting officers' error in taking the mistaken arrestee into custody?

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The Respondents Anthony J. Pires and City of Pittsfield respectfully request that this Court deny the petition for writ of certiorari seeking review of the First Circuit's opinion in this case. The opinion is reported at 740 F. 2d 78 (1st Cir. 1984).

COUNTERSTATEMENT OF THE CASE

The facts of the case as set forth in the Petitioner's Statement of the Case are erroneous and misleadingly

sparse. The statement of facts contained in the opinion of the First Circuit at 740 F. 2d 78, at pp. 80-83 and included in Petitioner's Appendix A, pp. A-3 through A-9, is far more complete and accurate. The Respondents refer the Court to the First Circuit's recitation of the facts of this case and supplement those facts only to the following extent.

By November 13, 1979, the Pittsfield, Massachusetts, police were seeking an Eric Walters a/k/a Lee Barrett on three warrants for assault with intent to murder Gene Sayers, David Sinopoli and William DeCelles on November 1, 1979, near Danny's Bar in Pittsfield. By November 13, 1979, the Pittsfield police also had information that the suspect in the Sayers/Sinopoli/DeCelles incident was the same individual who had, the month before, beaten a young woman at Danny's Bar. (Respondents' Appendix A). On October 16, 1979, a Cynthia Phiffer had complained to police that she had had a tooth knocked out at Danny's Bar by a man known to her as "J.D." or "Eric" and, on October 22, had called the police to further identify her assailant as "Eric Walters." (Petitioner's Appendix G, Respondents' Appendix B) Therefore, contrary to Petitioner's claim (Petition, p. 4), when Ms. Phiffer ran into the Pittsfield police station on November 13 to report that she had just seen "J.D."—"Eric Walters" in front of the station house, the Pittsfield police, if not the actual arresting officers, did have substantial information that the Sayers/Sinopoli/DeCelles assailant was the same person as the Phiffer assailant.

Although at the 1983 trial, Ms. Phiffer was tentative in her identification of the Petitioner Dale Gero, she was

absolutely unequivocal on the day of his arrest in November, 1979. (Respondents' Appendix C)

Petitioner stresses the disparity between his own features on the day of his arrest and some of the descriptions in some of the witness statements obtained by the police as of November 13. (Petition, p. 5). The police had descriptions of Walters ranging from a height of 5'11" to 6'2", a weight of 185 pounds to 220 pounds, and a beard and hair color of "blond" to "blondish brown" to "blond, red, brown" to "brown frizzly" (Respondents' Appendix D). At the time of his arrest, Petitioner was 5'11", 165 pounds and had brown hair and beard. Much more significantly, Petitioner had a remarkable facial resemblance (Respondents Appendix E, Photograph 10) to Walters, the intended arrestee (Respondent Appendix E, Photograph 3).[1]

Both Petitioner and Walters had a substantial connection with Phoenix, Arizona as indicated in the First Circuit's statement of the facts of this case (Petitioner's Appendix A, pp. A-4 through A-9).

The jury below found for the arresting officers on all claims, including state law claims that the officers arrested Petitioner without probable cause.

———o———

[1]Even at trial of this matter, when he had every reason to articulate every difference between the Walters' photograph and himself, Petitioner identified only the following differences: the shape of the hairline, the shape of the beard, V-shaped scar on forehead of Walters and darkened front tooth. (Respondents' Appendix D)

REASONS WHY A WRIT SHOULD NOT BE GRANTED

1. An Arrest Warrant Which Contains the Name of the Intended Arrestee and an Alias But No Physical Description is Not Constitutionally Defective And, In Any Event, Creates No Right to Damages Under 42 U S.C. §1983 If There Is Probable Cause to Arrest Apart From the Warrant.

Although not in itself governing of the state arrest warrant at issue in this case, Federal Rule of Criminal Procedure 4 provides guidance as to the degree of particularity required of arrest warrants in order to satisfy the Fourth Amendment, "from which the requirements of the Rules derive." *Wong Sun v. United States,* 371 U.S. 471, 481 n. 9 (1963). The Rule requires that an arrest warrant "shall contain the name of the defendant or, if his name is unknown, any name or description by which he can be identified with reasonable certainty." Fed. R. Crim. P. 4 (c)(1).

The warrant in this case contained the name of the intended defendant—Eric Walters—and a further name—Lee Barrett—which appeared on the Phoenix, Arizona identification he produced when stopped on an unrelated matter by Pittsfield police on November 2, 1979 (Petitioner's Appendix A, p. A-5). The warrant thus met the standard articulated in *West v. Cabell,* 153 U.S. 78 (1894), in that it did "truly name" Walters, the intended arrestee. The warrant provided additional identifying information in the form of his alias. Although it may well have been possible, or even prudent, for the Pittsfield police to have included on the Walters' warrant every descriptive detail known to them, the Fourth Amendment does not require such Proustian particularity. Moreover,

the police had a photograph of Walters and, although it was not physically attached to the warrant, the arresting officers were fully familiar with it. (Petitioner's Appendix A, p. A-6) The Petitioner was accidentally arrested because of his physical similarity to the intended arrestee and not because his name was the same as the intended arrestee, as may have been the case in *Powe v. City of Chicago*, 664 F. 2d 639 (7th Cir. 1981), or similar to the name listed on the warrant as in *West v. Cabell,* 153 U.S. 78 (1894).

Even if the Walters' warrant were facially invalid, the arrest itself would not, thereby, be rendered unlawful but instead must be scrutinized under *United States v. Watson,* 423 U.S. 411 (1976), as a warrantless, daytime felony arrest occurring in a public place. *Ferganchick v. United States,* 374 F. 2d 559 (9th Cir. 1967). If there were probbale cause to arrest the Petitioner without the warrant, then any defects in the warrant are immaterial for Fourth Amendment purposes and, necessarily, for 42 U.S.C. § 1983 purposes.

2. Neither the Decision Below Nor the Record Raises the Question Presented in the Petition: "Should Baker v. McCollan, which holds that there is no constitutional violation where an innocent person mistakenly named in a warrant is arrested, be extended to a situation where an innocent person not named in the warrant is arrested?"

The Petitioner suggests that the First Circuit has extended the holding of *Baker v. McCollan,* 443 U.S. 137 (1979) to situations in which any individual not named in an arrest warrant is arrested pursuant to that warrant. The Petitioner misreads the First Circuit's opinion.

The First Circuit concluded that because the Walters' warrant was facially valid or, in the alternative, because the Pittsfield police had probable cause to make a warrantless felony arrest of Walters, the only issue was whether, as a matter of law, the arresting officers were reasonably mistaken in believing that the Petitioner was Walters. If the arresting officers were reasonably mistaken in their belief that the Petitioner was Walters, then the Petitioner's arrest was valid under *Hill v. California*, 401 U.S. 797 (1971).

Baker v. McCollan, 443 U.S. 137 (1979) is significant to this case primarily for the axiom that "[t]he Constitution does not guarantee that only the guilty will be arrested." Nothing in the First Circuit's opinion or in the record suggests that that axiom was extended by either the District Court or the First Circuit.

3. The Same Fourth Amendment Standard Applies to Money Damage Claims Under §1983 As Applies in the Criminal Context.

In assailing the First Circuit for concluding that "[t]he decisive question is whether, if Walters had been arrested, he could have challenged the warrant," the Petitioner argues that a different and more stringent Fourth Amendment governs civil damage claims under § 1983 than controls cases in the criminal context.

The Petitioner asserts that *United States v. Leon*, 104 S. Ct. 3405 (1984) and *Illinois v. Gates*, 103 S. Ct. 2317 (1983), by altering the exclusionary rule sanction for Fourth Amendment violations in the criminal law setting, have also reduced the evidentiary threshhold necessary for recovery of damages pursuant to 42 U.S.C. § 1983. Whatever merit there may be in the Petitioner's

claim that § 1983 damage awards should be encouraged by this Court, the statute nevertheless requires a "deprivation of . . . rights, privileges or immunities secured by the Constitution and laws" before liability may attach. The "deprivation" alleged in this case is the claimed deprivation of the Petitioner's right to be secure against unreasonable searches and seizures, as provided in the Fourth Amendment. A vast body of law, primarily in the criminal context, defines the contours of the Fourth Amendment right which is the same right whether the claimant is a presumptively innocent criminal defendant or a purportedly innocent civil plaintiff. Contrary to the Petitioner's assertion, there is no "essential distinction between the [Fourth Amendment] rights of the actual suspect raised in a criminal context, [and] the [Fourth Amendment] rights of an innocent person arrested on a warrant naming someone else raised in a civil context." (Petition, p. 10)

4. On the Evidence In This Case, There Was, As A Matter of Law, Probable Cause to Arrest Eric Walters And A Reasonably Mistaken Belief On the Part of the Arresting Officers That the Petitioner Was Eric Walters.

The First Circuit properly concluded that the arrest of the Petitioner was constitutionally valid. The Petitioner has never seriously disputed that there was probable cause to arrest Eric Walters for the assault with intent to murder Sayers, Sinopoli and DeCelles. Accordingly, Petitioner's argument about the invalidity of the warrant is largely academic.

The ultimate issue is whether the arresting officers, as a matter of law, reasonably mistook the petitioner for Eric Walters, because " '[w]hen the police have probable

cause to arrest one party, and when they reasonably mistake a second party for the first party, then the arrest of the second party is a valid arrest.'" *Hill v. California*, 401 U.S. 797, 802 (1971). The jury found for the arresting officers on all counts, including the state law claims that the petitioner was arrested and held without probable cause.

By means of radical editorial surgery, the Petitioner has the First Circuit concluding that " 'the cause of Mr. Gero's arrest . . . was Phiffer's assertion that she had just seen Walters driving a blue pickup truck.' " (Petition, p. 16) The Court of Appeals said no such thing. The First Circuit actually said,

> " . . . even if the warrant were invalid, it was not the cause of Gero's arrest. The arrest was *precipitated* by Phiffer's assertion that she had just seen Walters driving a blue pickup truck . . . And when the truck was stopped, Phiffer's identification was confirmed by the remarkable facial resemblance of Gero to the photo that the police had of Walters." (Petitioner's Appendix A, p. A-11-12) (emphasis added)

Although the First Circuit did not repeat the fact at this point of its opinion, the identification by Phiffer and the photographic similarity was further corroborated by the Petitioner's coincidental Phoenix identification and his reluctance to actively protest his arrest.

Subsequent to the Petitioner's arrest, eyewitnesses to Walter's crimes and at least one close friend of Walters' identified the petitioner as Walters in a photo array which included photos of both the Petitoner and Walters. Although such subsequent erroneous identification did not contribute to the mistaken arrest of the Petitioner, it does

suggest that the mistake by the arresting officers was, indeed, reasonable.

5. On the Facts of This Case, Neither Supervisory Personnel Nor the Municipal Employer Could Be Liable On the Basis of Arresting Officers' Mistaken Belief That Petitioner Was Walters.

The Petitioner has not disputed that the Pittsfield police had probable cause to arrest Eric Walters for the Sayers/Sinopoli/DeCelles felony assault. The issue of liability turns, therefore, on whether the arresting officers were reasonably mistaken, under *Hill v. California,* 401 U.S. 797 (1971), that the Petitioner was Walters. The sole participants in the effort to follow Ms. Phiffer's lead, pursue the blue pickup truck, investigate and ultimately arrest its operator were the arresting officers Henault and Sherman, both of whom the jury found to be without liability for the Petitioner's arrest.

There was no evidence introduced that any deficiency in employment, training or supervision led to the field mistake that the Petitioner was Walters. There was no evidence that the acting police chief, Respondent Pires, or the municipal employer, Respondent City of Pittsfield, in any way contributed to the field error leading to the Petitioner's arrest. Moreover, the officers who committed the error, Henault and Sherman, were exonerated from liability by the jury. Without any evidentiary basis for liability, the Respondents would be entitled to judgment as a matter of law.

CONCLUSION

For all the foregoing reasons, the Respondents respectfully request this Court to deny Petitioner's demand for a writ of certiorari to the United States Court of Appeals for the First Circuit.

DATED: December 26, 1984

Respectfully submitted,

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APPENDIX A

PLAINTIFF'S EXHIBIT NO. 27

REPORT TO CHIEF

Date: November 4, 1979 Subject: Incident involving Gene Sayers

Chief:

On the above date while talking to Thomas Fisk of Winter Street, a cab driver for the Yellow Cab, he stated he was a witness to the whole incident. I asked him what happened and he said he was driving his cab down by Ricos when he saw a fight. He said David Sinopoli was on top of this guy when J.D. who he knows from Danny's jumped out of his blue van and started hitting Sinopoli with a club and then started smashing on the front window of a pickup. The pickup then smashed into the van and took off. Mr. Fisk followed J.D. but he stopped on Spring St. He stated he knows who J.D. is from Danny's, he was there when J.D. beat up some girl, (Cindy Phiffer incident). He was supposed to come to the station at 7:00 A.M. this morning but must of had to work late.

Respectfully submitted by
Off. Robert J. Smith (L 8).

APPENDIX B

PLAINTIFF'S EXHIBIT NO. 9

10/22/79

D/M

Cynthia Phiffer called and stated that she had found out who the guy was that hit her on October 16, 1979.

She stated that the guys name was Eric Walters and that he is suppose to be living with a girl by the name of "Pat" who is a Warlock on Brown Street.

We told Off. Marby to look for the yellow van with N.Y. tags and if seen to leave a report on where and the reg. # of the vehicle.

N/M

10/29/79

Check to be made to see if he or someone with that name is a Parolee, Parole Officers (Wayne Boyce)

Probation called]
d/c for ct] Neg.

433-9014

Related to Bill Ryan, said he will talk to Boyce at this time its only Walters, will call if anything different.

/

APPENDIX C

PLAINTIFF'S EXHIBIT NO. 34

Where Taken	By Whom	Date & Time Taken
Pittsfield Police Dept.	Det. Sherman	11/13/79-3:55 P.M.

I, Cynthia A. Phiffer am 20 years of age, born on November 14, 1958, my address is 50 Spring Street, Pittsfield, my tel. no. is 3-4863, my occupation is unemployed and degree of education is 9th grade.

I make the following statement freely and voluntarily to Det. Henault, Sherman of the Pittsfield Police Department after having been told that I do not have to make any statement and that anything I say may be used against me.

Tuesday, November 13, 1979, as a result of knowing a man named J.D. and Erick Walters and knowing that the Pittsfield Police were looking for him and knowing him to be the same person that knocked my teeth out I was by the Pittsfield Police Department and I saw him driving a blue pick up truck. I went into the Pittsfield Police Department and told the detectives what I had seen and the kind of truck he was driving. The detectives had me go with them and we checked all the places he is known to go to and while were were going up First Street, I saw the truck coming out of the parking lot. The only

difference with the truck when I saw it on First Street from when I saw it by the Police Station was that it had wooden boards up the sides of the back but the driver was J.D. The detectives followed the truck up First Street and the truck had to stop behind traffic and the detectives got out and went to the truck and had J.D. get out. This man who they took out of the truck was J.D. or Erick Walters and it was the same man who knocked my teeth out and who the police have a warrant for his arrest. I never saw the truck before today. I was afraid he would see me because he is supposed to carry guns on him so I got down in the back seat of the detectives car and don't know what they did with him after they took him out of the truck.

Time Signed: 4:10 P.M.

APPENDIX D

EXCERPTS OF TRIAL TRANSCRIPT

Gero v. Henault, et al., August 1983 (D. Mass 1983)

Testimony of Anthony J. Pires

Q. [By Mr. Dibble] Physical description, height, weight, hair color, things identifying characteristics, what information did you have on October 17th with regard to the description of the person J.D., Eric Walters?

A. On the [Phiffer] assault and battery report left by Officer Finn?

Q. That's right.

A. It states that he is six-foot-two, two hundred pounds, shoulder-length blond hair, possible beard and mustache, scars on left forearm.

A. Yes.

Tr. at 513

Q. [By Mr. Dibble] Was there a description [Exhibit 14] given of this J.D. Dean from Lanesboro, Mass.?

A. They further described the person about six-foot-two, two hundred and twenty pounds, long blond hair, beard and mustache.

Q. Anything else?

A. Also that the person has slash marks on his arm.

Q. Slash marks on his arms?

A. Yes, sir.

Tr. at 552

A. [Exhibit 15] is a report from Officer Dermot Sporbert to the Detective Bureau with reference to the incidents and the assault on November 2nd, 1979.

. . . .

Q. [By Mr. Dibble] What does the officer put in this report—what did he say, what was his report?

. . . .

A. Barrett was described by the officer as a white male, six-foot-two, a hundred and eighty-five to a hundred and ninety pounds, medium build, beard and brown frizzy hair.

Tr. at 553

Q. [By Mr. Dibble] Was there any description given by Mr. DeCelles in his statement with particular reference to the lower part of the first page of Plaintiff's Exhibit #16, is there a description of this fellow involved in the assault, the sentence that says "this guy with the club"?

A. Yes, sir.

Q. What does it say?

A. This guy with the club was medium build, was wearing a flannel shirt. He had a beard and long hair. I think his hair was blond or a light red or brown.

Tr. at 559

Q. [By Mr. Dibble] Now, what was Sayers description of the [563] driver of the blue van, looking at the middle of that [564] first paragraph?

A. The driver hopped out, a white male, mustache, about five-foot-eleven, blondish-brown hair, shoulder

length, straight, wearing I believe a sweatshirt, blue dungarees—that is about it.

Tr. at 563-564

Testimony of Dale J. Gero

Q. [By Mr. Dibble] What were the differences that you were able to point out from the photographs?

A. The man in the photograph had a different shaped hairline than mine. The shape of his beard was different than mine. He had a V-shaped scar in the middle of his forehead, and he had a darkened front tooth.

Tr. at 61

APPENDIX E

DEFENDANT'S EXHIBIT R